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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 169

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, A Corporation

Petitioner

v.

STATE OF ALABAMA ex rel. RICHMOND M. FLOWERS
Attorney General of the State of Alabama

Respondent

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does this court have jurisdiction of the Petition for Writ of Certiorari?

2. Did affirmance, without reaching the merits, by the Supreme Court of Alabama for failure of petitioner to comply with the court's rules relative to assignments of error and proper argument thereof in brief deprive petitioner of any Federal constitutional right?

ARGUMENT

An assignment of error is in Alabama an instrument of appellate pleading. *Board of Education of Colbert County v. Mitchell*, 270 Ala. 594, 121 So.2d 103; *Wetzel v. Hobbs*, 249 Ala. 434, 31 So.2d 639.

It is the duty of an appellant to see that his appeal is perfected according to the requirements of the statutes and

rules of court. *State v. Fourth National Bank of Columbus, Georgia*, 270 Ala. 135, 117 So.2d 145.

Federal courts have affirmed or dismissed appeals for failure to comply with rules similar to the ones here applied. *Butter v. United States*, 108 Fed.2d 27; *Fleming v. Musingwear*, 162 Fed.2d 125; *Matthewson, et al. v. First Trust Co. of St. Joseph, Mo.*, 100 Fed. 2d 121; *American Ins. Co. v. Scheufler*, 129 Fed.2d 143; *The Catherine v. The United States*, 11 U.S. 99; *Portland Co. v. United States*, 82 U.S. 1.

As a general rule, matters of local practice are not open for review in the Supreme Court of the United States. *Washington v. Miller*, 235 U.S. 422.

It rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local law; and state courts may refuse to consider a Federal claim if the appellant violates reasonable state rules of procedure. *Parker v. Illinois*, 333 U.S. 571; *Jacobi v. Alabama*, 187 U.S. 133; *Fox Film Corporation v. Muller*, 296 U.S. 207; *In re Marshall Lumkin*, 355 U.S. 59, 2 L.Ed. 29.

However, the lower appellate court must have fair and substantial support for its ruling and it must not be new or novel. *Wright v. Georgia*, 373 U.S. 284; *Williams v. Georgia*, 349 U.S. 375; *Davis v. Wechsler*, 263 U.S. 22; *N.A.A.C.P. v. Alabama*, 357 U.S. 449.

The Supreme Court of Alabama considered petitioner's brief in that court. In many respects, it was sufficient.

It was not sufficient in that under five separate subdivisions assignments of error were grouped; they were not related and were subject to the long standing rule of frequent application that where assignments of error are argued together and one is without merit, the others will not be considered.

Alabama Supreme Court Rule 9 provides the following:

> "Appellant's brief under separate headings shall contain: (a) under the heading 'Statement of the Case,' a concise statement of so much of the record as fully presents every error and exception relied upon referring to the pages of the transcript; (b) under the heading 'Statement of the Facts,' a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely, referring to the pages of the transcript, and if the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, then the statement shall contain a condensed recital of the evidence given by each witness in narrative form bearing on the points in issue so as to fully present the substance of the testimony of the witness clearly and concisely; (c) under the heading 'Propositions of Law,' a concise statement, without argument, of each rule or proposition of law relied upon to sustain the errors assigned, together with the authorities relied upon in support of each, and in citing cases, the names of parties must be given, with the book and page where reported; (d) argument with respect to errors assigned which counsel desire to insist upon. Assignments of error not substantially argued in brief will be deemed waived and will not be considered by the court. The statements made by appellant under the headings 'Statement of the Case' and 'Statement of the Facts' will be taken to be accurate and sufficient for decision, unless the opposite party in his brief shall make the necessary corrections or additions."

The court has said that the rule should be liberally con-

strued and fairly applied but must not be wholly ignored. The Supreme Court of Alabama may in its discretion consider the brief, though not in compliance with the rule, where the brief fairly and helpfully makes the points upon which appellant relies. The court has discretion as pointed out in *Commercial Standard Insurance Company v. New Amsterdam Casualty Company*, 131 So.2d 182, and *Bolton v. Barrett Lumber and Supply Company*, 267 Ala. 74, 100 So.2d 9, but we know of no case where the court has considered the merits when there was no assignment of error or when one of several unrelated joint assignments of error was not well taken. *Dobson v. Deason*, 258 Ala. 219, 61 So.2d 764. This is true in both the Court of Appeals and the Supreme Court of Alabama. *Snellings v. Jones;* 33 Ala. App. 301, 33 So.2d 371; *Alabama Chemical Co. v. Hall*, 212 Ala. 8, 10, 101 So. 456.

We go back sixty years to an unbroken line of decisions. In *Mobile, Jackson & Kansas City R. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395, it was ruled that a joint assignment of several rulings can avail nothing unless each is good.

The following is stated in Volume 2A, Alabama Digest, "Appeal and Error," Key No. 736:

> "Where assignments of error are joint as to more than one ruling, they must fail unless valid as to all such rulings."

Then follows the citation of some one hundred fifty cases or more from the Court of Appeals and Supreme Court of Alabama showing that this rule is applicable and applied to all assignments of error on pleadings, evidence, and instructions. Volume 2A, supra, Key Numbers 737, 738, 739, including the Pocket Part.

Sixty years is enough to show that no new or novel Supreme Court procedure on appeal has been applied to petitioner and substantial basis has been shown for its ruling.

In the 1963 Pocket Part of Volume 2A, supra, alone appears about forty decisions. The Bench and Bar of Alabama are well informed as to this appellate procedure, and petitioner had Alabama counsel.

The petitioner has not cited, and in reply brief we challenge counsel to cite, a single Alabama case where the Supreme Court of Alabama has considered joint unrelated assignments of error when any one of them was not well taken.

THE CASES CITED BY PETITIONER

Bolton v. Barnett Lumber Co.

In this case the court exercised its discretion and considered appellant's brief and did not affirm, though it might have, for failure to properly prepare the brief. The court stated, however, that the joint assignments or error must be treated as argued in bulk. It said:

> "This court has consistently held that where several assignments of error are grouped and argued together in brief, and one found to be without merit, the court will not consider the others."

The court then in spite of the brief, which was not properly prepared, considered a *single assignment of error*, which *was properly* assigned. It did not depart from the well settled and applied rule set forth in the next above quoted part of the *Bolton* case.

Guy v. Lancaster

This case involved the court's discretion in considering the brief, but did not involve the joint assignments of error rule.

Madison Limestone Co. v. McDonald

Assignments of error 11, 12 and 13 were treated in this case as sufficient for review though not properly expressed. The case did not involve the joint assignments of error rule.

Thompson v. State

This case was written by the justice who wrote the present opinion. It is on all fours with the present case here considered. We invite the court to read it. It supports exactly *the Respondent's* position.

Shelby County v. Baker

The assignments of error were treated as "somewhat kindred" and therefore without the rule.

Edge v. Bice

This case held that if appellant's brief does not comply with Rule 9 of the Supreme Court rules, but does, however, fairly and helpfully make the points relied upon, the court in its discretion may consider the points on their merits.

It did not involve joint assignments of error, one of which is bad.

Simmons v. Cochran

This, as the above *Edge* case, involved a motion to strike the brief, and in the exercise of its discretion, the court would not do so.

It did not involve joint assignments of error argued in bulk and not kindred.

Christian v. Fidelity and Casualty Co. of New York

This case also written by the justice who wrote the present case in this court. The case held that "all the argued assignments of error in the instant case raised kindred questions."

In the present case written by Justice Merrill they did not.

Brothers v. Brothers

This case related to the failure to number two assignments of error (10th and 11th) and is not applicable here.

Wood v. Wood

This case related to the manner of preparation of appellant's brief and not to joint assignments of error argued in bulk with one having been found bad.

Quinn v. Hannon

Rules 1 and 10, Code 1940, Title 7, Appendix (Ala.), were here involved. The court said:

> "While we might, with justification, order an affirmance for insufficient compliance with these rules, we are inclined to exercise our discretion in the matter and give consideration to appellant's brief."

No joint assignments of error was involved and as here *the brief* was considered.

Bell v. Fulgham

An exercise of the court's discretion in considering in-

formal brief inattentive to rules here involved. It did not involve the treatment of joint assignments of error made and argued in bulk.

Stariha v. Hagood

This case involved waiver of assignments of error. The rule applied by the court in this case was not involved.

Kendall Alabama Co. v. City of Fort Payne

This case did not involve the rule applied in the case here on certiorari.

City of Montgomery v. Mott

The assignments were not referred to by number in this case, obviously not involving the joint assignments of error here involved.

State v. Farabee

Involved consideration of brief in discretion of the court that did not comply with part of rule not involved here. It did not involve consideration of joint assignments of error argued in bulk.

Brooks v. Everett

None of the assignments of error were specifically referred to in appellant's brief. Here court exercised its discretion and considered matters not involved in a joint assignment of errors argued in bulk.

Conclusion

The Supreme Court of Alabama has consistently applied to others the rule applied to petitioner. No case from Alabama has been cited to the contrary. This case does not involve contrary decisions by the court on the same point involved. It is unlike *N.A.A.C.P. v. Alabama*, 357 U.S. 449.

It is significant that no appellant in the one hundred fifty or more cases decided by the Supreme Court of Alabama has ever applied to this court as far as we know for certiorari on the ground that the rule of the Alabama court which requires all joint assignments of error to be good or none will be considered is violative of any Federal constitutional right. *Martin v. Walton*, 368 U.S. 25, 7 L.Ed. 2d.5.

Three-fourths of petitioner's brief relates to the merits. The merits of the case are not presented. No construction of Alabama's foreign corporation statutes has been made by the Supreme Court of Alabama as being applicable to petitioner. Until this determination is made, no constitutional questions can be said to be before this court. *Sage Stores Co. v. State of Kansas ex rel. Mitchell*, 323 U.S. 32; *United States v. Burnison*, 339 U.S. 87.

In fact on the merits no constitutional question is presented. *State ex rel. Griffith v. Knights of Ku Klux Klan*, 117 Kan. 564, 232, P. 254.

The above case is exactly in point and was dismissed on appeal by this court for want of a Federal question. 47 S.Ct. 458, 71 L.Ed. 829.

Respectfully submitted,

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Attorney General
State of Alabama

Gordon Madison, As
Assistant Attorney General
State of Alabama

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Gordon Madison, as Assistant Attorney General of the State of Alabama, one of the attorneys for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of February, 1964, I served a copy of the foregoing Brief for Respondent on Robert L. Carter, Esq., 20 West 40th Street, New York, 18, New York; Maria L. Marcus, 20 West 40th Street, New York 18, New York; Fred D. Gray, Esq., 34 North Perry Street, Montgomery Alabama; Arthur D. Shores, Esq., 1527 Fifth Ave., North, Birmingham, Alabama, attorneys of record for petitioner, by mailing copies in duly addressed envelopes with first-class postage prepaid, and airmail where required.

Gordon Madison
Assistant Attorney General
State of Alabama